

Newsletter n° 16/2011

Expert Judicial Opinions in the European Union

Appointment of the judicial expert

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Editorial

President Griss

It was in Luxembourg that the Network launched its activities for 2011. At the invitation of President Skouris, the Network met on 28 March 2011 with the Members of the Court of Justice of the European Union (CJEU) to discuss Cooperation in Civil and Criminal Matters after the Treaty of Lisbon. Judge Toader (CJEU) and President Koskelo (Finland) opened the floor in the morning session on civil matters followed in the afternoon by Judge Larsen (CJEU) and President Corstens (Netherlands) on criminal matters. These introductory reports have been followed by intense discussions. All participants expressed the wish that such round tables would be organized in the future.

The Board also met in Luxembourg on that occasion and fixed the time schedule of our work for the coming months. We will meet in Sofia on 13-14 October at the invitation of President Gruev to discuss on Budgetary Management and Resources of the Supreme Courts. First President Lamanda offered to host in Paris in the Fall of 2012 the Fifth Colloquium of our Network. The two following subjects are suggested for discussion: the Assessment and Promotion of Judges for Access to the Supreme Courts, and the Assessment and Qualifications for Appointment to the European Court of Justice and to the European Court of Human Rights.

As was previously indicated, the current Newsletter publishes the summary analysis made by the Cour de cassation of France on the basis of the 22 answers received from the Supreme Courts on the questionnaire on Judicial Expert Opinions.

EXPERT JUDICIAL OPINIONS IN THE EUROPEAN UNION

Expert opinions which are decided upon, or at least authorised, by a court or judicial authority may be termed judicial as compared with so-called private expert opinions arranged by the parties themselves. When thus defined, this concept is not applicable *stricto sensu* in certain European countries. The rule that the burden of proof lies with the parties involved may, for instance, preclude seeking an expert judicial opinion. In principle, this is so in England and Denmark for example. The replies given by these countries to the questionnaire therefore largely relate to the regulations applicable to private experts, who remain such even when it is the court that is responsible for appointing them*.

Subject to this reservation, the contributions of these two countries have been included in this analysis.

It should also be noted that, in England and Norway, the court may decide to enlist the aid of a non-professional judge (or assessor), who has a particular area of competence useful for understanding the case concerned. His or her task is not to conduct investigations but to shed light, for the court, on the evidence debated in the hearing. This institution is noted here for information, but not otherwise included in our study.

Also, the paucity and disparity of the statistics submitted cannot serve as a basis for sound conclusions, which is why this aspect will not be dealt with here. Similarly, the dearth of data supplied on administrative cases precludes any analysis of this legal area. Conversely, the distinctions expressly drawn by States between civil and criminal cases will be maintained.

Subject to these comments, our analysis of the replies to the various questionnaires will be chronological, dealing in turn with the appointment of the expert (I), the expert opinion procedure (II) and lastly, the conclusion of the expert's tasks (III).

I ? Appointment of the judicial expert

Whether or not to call for a judicial expert opinion (A) is usually determined by the factual elements of the case concerned. Once the principle of it has been accepted, the question then arises of the choice of expert (B), whose appointment is not necessarily final (C).

A ? Who calls for an expert opinion and when?

In civil cases, the procedural system in most States is akin to the accusatory procedure. This means that the trial is determined by the parties: they take the initiative and determine the subject matter. More particularly, it is their duty to establish the facts upon which to base their claims. They may therefore encounter problems when establishing, evaluating, interpreting or clarifying the factual elements of the case calls for specific, usually technical, knowledge which they themselves do not have, any more than does the court whose task it is to hear the case. Such problems form the essential motive for an expert judicial opinion in the countries covered by this study. Some of them specify that this measure cannot involve a legal element, the law being the preserve of the judge (Denmark, France, Italy, Lithuania), or compensate for the parties' shortcomings in furnishing evidence (Denmark, France, Greece, Italy, Luxembourg).

The initiative in calling for a judicial expert opinion may fall to either the parties or the court: in most cases, either the court, of its own motion or at the request of the parties, has the power to assess whether or not it is appropriate to have recourse to a judicial expert. In this connection, the German reply points out that, while not legally bound by the request made to it, the court usually grants it. Sometimes the court is obliged to call in an expert, for instance in cases of the incapacity of minors or majors (Denmark, Germany, Poland, Sweden), of the distribution of a country estate (Poland) or of rescission of a sale for lesion (Luxembourg). There are other noteworthy particularities: in Sweden and England, the expert opinion must be requested by the parties (in England, the appointment of an expert is, more precisely, subject to authorisation by the court); the Belgian court will only order an expert opinion if strictly necessary, the parties being able to oppose the appointment of the expert by mutual agreement; in Norway, the judge is bound by the agreement of the parties opposing the appointment of an expert when rights are at issue which the parties freely enjoy, the court having discretionary power in the opposite case.

With the notable exception of England, where this is a matter for the parties, it is always the court that appoints the expert. The parties may usually state their opinion, which in some countries they are obliged to do (e.g. in Austria and the Netherlands). Where there is agreement between the parties, certain countries state that this is usually respected (Belgium, Denmark, Netherlands), other countries stating that, in such cases, the court is bound by that agreement (Hungary, Latvia, Lithuania or Norway).

Under most legislations the parties have the right, in a variety of different ways, to order a private expert opinion. This possibility may be limited: in Italy, a legal expert must already have been appointed; in Malta, only the court may

authorise an expert opinion during the proceedings. The scope of such private expert opinions is generally more restricted, being regarded as offering fewer guarantees than expert opinions arranged in a formal judicial context, for example where respect for the adversarial principle is concerned (Belgium, France).

Lastly, it may be observed that recourse to an expert opinion prior to any proceedings may be authorised in order to preserve the evidence of facts on which the settlement of a case could depend (Austria, Belgium, France, Greece, Luxembourg, Netherlands) or in the context of a transaction (Denmark).

In criminal cases too, the special, technical knowledge of a third party may prove necessary to establishing or evaluating the circumstances of a case. The more inquisitorial character of the proceedings emerges from the regulations governing criminal expert opinions: in most countries, the criminal court may appoint a judicial expert of its own motion and is not bound by the requests of the parties (England again being an exception on the last point where all the parties are agreed). This power to appoint may also be devolved to the judicial authority in charge of the investigation ? the public prosecutor's office or investigating judge ? (Denmark, Germany, Hungary, Latvia, Netherlands, etc.). As in civil cases, it is the legislature that makes an expert opinion mandatory in certain cases: to determine the existence of a mental disorder which would give the perpetrator diminished criminal responsibility (Bulgaria, Hungary or Poland), in order to determine the causes of a victim's death (Czech Republic and Latvia) or when immediate hospitalisation is contemplated (Hungary).

B ? Persons who may be appointed judicial experts

The appointment of a public official as judicial expert, which is sometimes excluded or exceptional (Denmark, Netherlands, Norway), is possible as a rule (Austria, Belgium, Bulgaria, England, France, Hungary, Luxembourg, Sweden, etc.).

There is a greater contrast in the replies relating to the appointment of a legal entity as judicial expert. Although this possibility is accepted in many countries (Austria, Czech Republic, Cyprus, France, Greece, Hungary, Latvia, Luxembourg, Malta, Sweden), it may be expressly excluded (Norway) or implicitly so, as in England, where the expert must be able to make an oral statement in the proceedings and be cross-examined, and in Belgium, where the rules governing the challenging of experts would only appear to apply to natural persons. In certain countries the situation lies somewhere between: although theoretically possible in the Netherlands, the appointment of a legal entity is rare in fact; while excluded in principle in Germany, it is accepted in exceptional cases there (specially authorised government authorities) and in Denmark (publicly funded committees of experts).

Persons authorised to conduct expert opinions are always chosen on the basis of their competence in a particular field. To guarantee their quality, most countries have opted to draw up official lists of judicial experts region by region (Austria, Greece, Italy, Poland) or nationally (Hungary, Lithuania, Luxembourg, Netherlands [in criminal cases], Norway [in criminal cases]), or regionally and nationally (Bulgaria, Czech Republic, France). These lists generally follow predefined classifications of areas of competence (Austria, Bulgaria, Czech Republic, France, Hungary, Italy, etc.).

Notwithstanding these official lists, courts may be authorised to appoint experts not included in them (France in civil cases), sometimes by reasoned decision (France and Netherlands in criminal cases), owing to special circumstances (Norway [in criminal cases] and Italy) or when none of the experts in the list meets the requirements of the case (Czech Republic, Greece, Hungary, Lithuania, Luxembourg, Netherlands [in civil cases]).

For countries without a register of judicial experts, the selection is made on the basis of the experience, competence and reputation of the person concerned (Belgium, Norway [in civil cases], Sweden). It should also be noted that the system of lists is spreading, and in two ways. Firstly, a list of judicial experts is now being drawn up in the Netherlands (in civil cases) and various attempts have been made recently in Belgium to do this (so far without result). Secondly, in countries without any general official lists, special lists for certain topics are sometimes found (e.g. child experts for family disputes in Denmark) or unofficial ones drawn up by various institutions (Belgium).

The special case of Germany is noteworthy: midway between the two major trends observed, for over a century now it has had a system for the official recognition of judicial experts based on the existence of lists of publicly recognized, sworn legal experts which are organized not by the courts but by chambers of commerce and industry or other consular bodies such as chambers of trade. An expert may be selected from outside the official lists when they do not include any specialist in the field sought or owing to special circumstances.

C ? Grounds for challenging the judicial expert

The choice of expert may be called into question after their appointment. This may be as a result of a challenge by the parties or by the expert turning down the assignment. The grounds for this were not covered by the questionnaire.

In civil cases, a great many countries instance the same grounds for challenge as are applied to judges (Austria, Belgium, Czech Republic, France, Germany, Hungary, Italy, Poland, etc.). This may be the case even when not explicitly stated (Sweden). The grounds most frequently instanced are lack of impartiality or a conflict of interests generally arising from family, professional, contractual, proprietary or procedural ties with the parties. The grounds for challenge may also be specific to the experts concerned ? a relationship of interdependence with another expert appointed in the case (Norway), lack of the necessary professional permits, in particular for public officials ? (Bulgaria, Greece), the expert's qualifications (Denmark) or, more broadly, any serious ground (Greece). Conversely, certain grounds applicable to judges may be set aside for experts, such as previous involvement in the case as an expert (Germany, Norway). In the Netherlands, where there is no provision stipulating any ground for challenging the expert, it is the expert opinion itself that will be disputed by the parties (the principle of it, the procedure followed or its conclusions).

In criminal cases, judging by the replies which drew a distinction between civil and criminal cases, most countries also refer to the grounds for challenge applied to judges (Germany, Italy, Malta, Poland), while some of them have an official list of grounds for challenge that are specific to experts (Hungary, Lithuania). In either case, a similarity between many grounds for challenge may be noted. The commonest are again impartiality and a conflict of family, professional, contractual, proprietary or procedural interests. The last mentioned would appear to be more significant here than in civil cases: experts may be challenged when they are the victims of the crime or offence concerned, have already been involved in the proceedings in an investigative or prosecuting capacity, as counsel, judge, witness or expert and, more generally, when they have a personal interest in the case concerned. Other expert-specific grounds are also found, such as incompetence (Lithuania), or any reason preventing them from producing an objective, impartial report (Hungary).

II ? The expert opinion procedure

In carrying out their duties, judicial experts must comply with certain binding rules (A), usually under the supervision of a judge, who will ensure that the procedure is properly followed (B). Should they fail to comply with their obligations, various sanctions may be considered (C).

A ? Compliance with the binding rules of the expert opinion procedure

In carrying out their duties, judicial experts are under an obligation to comply with a number of rules similar in most European countries. Some of them are part and parcel of any legal proceedings and akin to those with which judges themselves must comply. Those most frequently cited are objectivity, impartiality, respect for the guiding principles of the proceedings (in particular the adversarial principle, which applies both to informing the parties in good time and including their statements in the final report) and upholding professional secrecy. This, it may be noted, which is often referred to for the obligation it places on experts only to divulge information received in their work to the court and the parties, may also (like respect for private life) be applied to experts when conducting their investigations (Denmark, France, Germany or Lithuania).

The procedural status of experts is also akin to that of witnesses in other respects. In many countries, they may be questioned in the hearing and must comply with the summonses to appear served on them by the court (Austria, Czech Republic, Lithuania, Norway, etc.). They often have to take the oath, either when placed on an official list of judicial experts (e.g. in France or Poland), or following their appointment (as in Austria, Germany or Poland, when the expert concerned is not included in the official list), or when being examined by the court (as in England or Sweden).

There are other specific requirements of experts in performing their duties: they must do so with professionalism (which in particular implies that they do not exceed their sphere of competence and use reliable, recognized methods), complying with the material limits of the latter and the deadlines they have been set. Some European legislations refer more generally to the ethical code applicable to the profession of judicial expert (Bulgaria, England, Hungary).

Apart from these broadly accepted rules, certain specific characteristics may also be noted. For example, the Czech Republic makes experts responsible for filing and storing the expert opinions they have conducted. Latvia emphasizes the necessity to respect the health and honour of the individual as well as the mental health of the child when conducting expert opinions, while Belgium places an obligation on its experts to seek to reconcile the parties regarding civil claims.

B ? The court's supervision of the expert opinion procedure

It is generally accepted that the court may supervise the progress of an expert opinion, this supervision, depending on the country concerned, ranging from simple right of inspection to involvement in the expert's work. Such supervision is usually indirect, in the sense that it is exercised at the outset, when the court determines the object of the expert opinion, the questions submitted to the expert, the deadline fixed or the instructions which the expert must follow. The supervision may also be indirect, as pointed out by the reply from Lithuania, when the court determines which pleadings the expert will have access to.

The expert opinion may also be expressly placed under the supervision of a judge (Belgium, Denmark, France, Germany, Italy, Luxembourg, etc.), usually the one having ordered the expert opinion. Experts must then keep the judge informed of their progress, to ensure that deadlines and procedural rules are observed (the adversarial principle above all). To do so, he has various powers, the commonest being the ability to impose time-limits and to order any measures required. For example, he may direct the parties, under compulsion if need be, to produce documents, provide information or more generally co-operate with the measure concerned or face the consequences if they decline to do so (Belgium, Denmark, France). The judge may sometimes participate in the process (Belgium, Germany, Luxembourg, Poland), rule on any disputes arising during it (Belgium), modify the object of the expert opinion (Belgium, Poland) or have the expert dismissed or replaced (cf. Below).

In some legislations on the other hand there is no provision at all for judicial supervision of expert opinions (Cyprus, Greece, Latvia), experts preparing and writing their reports in complete independence. Midway between these two extremes, the English court has only limited control over the expert's work, for instance by ensuring equal access to documents and information by the experts of each party; similarly, under Dutch civil procedure, it is up to the court to ascertain whether the expert's investigations will be conducted under its supervision or not.

C ? Sanctions applicable to the judicial expert

Negligence by experts in performing their tasks (when their reports are not up to standard, show inconsistencies, have gaps, etc), failure to observe the governing principles of the proceedings, deadlines and tasks assigned, failure to comply with a summons to appear in court are all situations which would normally authorise an expert's replacement, reduction of salary or a fine and, more seldom, the scrapping of their report (France, Italy, Luxembourg). Disciplinary sanctions against them may be ordered by the competent body in such cases ? removal of the person responsible from the list of experts (Austria, Bulgaria, Czech Republic, France), temporary suspension or withdrawal of their accreditation (Lithuania), dismissal (Luxembourg), or banning them from conducting expert opinions (Malta).

In the majority of cases, if the parties can prove that they have suffered injury, they may also claim civil liability against the expert by demonstrating his or her negligence. Such action will normally entail the apportionment of damages corresponding to the various costs occasioned by the expert's conduct.

The expert's criminal liability may likewise be engaged by the prosecuting authorities of the State concerned pursuant to incriminations specially applicable to experts (for example, France incriminates the corruption of the expert, Belgium incriminates the falsification, by experts, of their written reports or oral statements, the Czech Republic incriminates the preparation of a false expert opinion, Italy incriminates the refusal by experts to perform their tasks, etc.) or falling under common law (corruption, false testimony, forging documents, perjury, breach of professional secrecy, etc.). The usual penalties are fines and imprisonment (up to 10 years). In Lithuania and Latvia there is also the possibility of carrying out public works and in the Czech Republic a ban on practising may also be served.

III ? Conclusion of the judicial expert opinion procedure

The expert's duties usually conclude with the oral or written communication to the court of their report (A), which the court must evaluate before delivering its decision (B). Having performed their duties, experts are entitled to remuneration (C).

A ? The judicial expert's report

The submission of their report generally marks the end of a judicial expert's assignment. Much less often, another date is used (such as the extinction of the case in Italy).

In civil as in criminal cases, the report is mostly a written one (Cyprus, Denmark, England, France, Germany, Greece, Italy, Latvia, Malta, Norway, Sweden, etc.). Written conclusions have sometimes become the norm in countries where the choice of the form of the opinion is at the discretion of the competent authority (Poland), or in countries where experts are supposed to present their conclusions orally (Czech Republic, Hungary).

After submitting their reports, experts may have to elaborate on them in a hearing. The bulk of European States provide for this possibility in both civil and criminal cases. Experts thus have to elaborate on their reports orally and explain any grey areas to the various parties involved in the proceedings. On such occasions, experts may have to answer questions put by the parties (in Bulgaria, Denmark, Germany, Latvia and Poland for example). It is sometimes an obligation for experts to appear in a court hearing, such as in criminal cases in Austria, or before the Cour d'assises in France. However, when experts are expected to provide explanations, they need not always be in oral form: the court may invite them, as in Luxembourg or Poland for example, to do so by means of a complementary or additional report.

B ? The court and the conclusions of judicial expert opinions

It is unanimously accepted that courts are not bound by the conclusions of judicial expert opinions. This is largely explained by the fact that they are regarded as just one piece of evidence among others which judges or juries are free to weigh up and are simply intended to provide the courts with information they otherwise do not have.

The other explanation given is that when a court commissions a judicial expert opinion, it is not delegating its legal power to the expert. Nevertheless, certain countries acknowledge that experts' conclusions are usually followed (France, Greece, Hungary), judges lacking the knowledge which might enable them to dispute them.

The court's freedom as regards expert opinions is not necessarily total: in Bulgaria, the Czech Republic, Italy, Lithuania, Netherlands, the court must give reasons for its decision if it is at variance with the expert's conclusions. Bulgaria and England explain that the court cannot reject the expert's conclusions unless there is evidence established by other evidence contradicting it. If there is, or when the report is inconsistent, ambiguous or incomplete, the court may complete its information by calling for a further expert opinion, a contrary expert opinion or explanations from the expert (Bulgaria, Germany, Lithuania, Poland, etc).

C ? The judicial expert's remuneration

The judicial expert's remuneration is usually understood to mean the fees and expenses arising from the assignment. The fees are often determined by a legal or regulatory tariff (such as in Austria, Belgium [in criminal cases], Czech Republic, Germany, Italy, Latvia, Luxembourg, Norway) based on an hourly or flat rate. In order to fix the expert's remuneration, whether flat rate or other, the court must take certain elements into account, such as the field of expertise concerned, the time spent on the assignment, the quality of the work done, the tasks performed, the complexity of the expert opinion, the expert's level of qualification, usual earnings in the profession or the cost of the dispute. The payment of a deposit before the expert starts work may have been ordered, as in Belgium (in civil cases), France, Lithuania, Malta or the Netherlands. The final amount of the remuneration is fixed when the expert's duties have been completed to ensure that all the tasks carried out and all costs incurred are covered.

Ultimate responsibility for the cost of the expert opinion varies from country to country. In civil cases, it may lie with the losing party (as in Austria, England, France or Luxembourg), with the party having called for the expert opinion (as in Greece, Hungary or Norway), but may also lie with either party depending on whether the expert report turned out to be essential to settling the dispute or not (Denmark). In criminal cases, in most countries, the cost of the expert opinion is borne by the State. Yet certain legislations provide for it to be claimed back from the party found guilty. This is the case, for example, in Austria, Bulgaria and Malta.

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